Concerning the car BCB 6896 in PW2's police report at the seventh line, there is no evidence to suggest that two cars of similar make with almost the same registration number had been involved and considering the correct car registration number in the third line of the same police report, the court holds that BCB 6896 is actually only a typewriting error of BCB 6096.

Finally, the release of the said car to the accused through his brother some two years after the offence does not in any way affect the prosecution's case as there is ample evidence to show that that was the car used in the commission of the offence and furthermore it was not the subject matter of the charges.

On these considerations, the court having earlier found that the prosecution had established a prima facie case against the accused, on the basis of the accused's prepared written statement, was of the opinion that his mere denial through this statement from the dock had not raised any doubt on the prosecution's case. His denial of knowledge of the firearms and ammunition, his explanation that the car door lock was faulty and could be opened from the outside, his allegation that he was in the habit of lending his car to his friends and his suggestion that this could be a frame up as he had business enemies, was to my mind purely a concoction calculated to pervert the course of justice in the light of the case for the prosecution.

In consequence, I found the accused guilty and convicted him on the two charges as amended as regards the date of the proclamation which should read 15 May 1969 instead of 15 March 1969. The accused had one previous conviction for theft in 1976 which he admitted but with or without this previous conviction the court had no other alternative as regards sentence after having found him guilty on both the charges but to sentence him to death.

Order accordingly.

Solicitors: *Paramjit & Co.*

Reported by *Prof Ahmad Ibrahim*

B-Trak Sdn Bhd v Bingkul Timber Agencies Sdn Bhd & Anor

HIGH COURT (KOTA KINABALU) – CIVIL SUIT NO K924 OF 1985
ABU MANSOR J
26 SEPTEMBER 1986

Civil Procedure – Application for summary judgment – Delay in making application – Effect – Triable issues – Rules of the High Court 1980, O 14

Contract – Illegality – Public policy – Agreements for lease of goods – Whether in fact and in law agreements for sale or hire-purchase – Tax avoidance – Whether illegal – Whether there was intention to mislead the Revenue – Whether agreements void – Damages – Need for proof – Contracts Act 1950, s 24(b) & (e)

Revenue Law – Tax avoidance – Whether illegal – Income Tax Act 1967, s 140

By a number of agreements in writing, the first defendant rented from the plaintiffs nine units of equipment. The second defendant had undertaken to guarantee the punctual payment by the first defendant of sums payable under the agreements. The first defendant paid only part of the rentals due and owing. The plaintiffs alleged that in breach of the terms of the agreement the first defendant had failed to keep the equipment in good order and repair and that as a consequence the first defendant was liable for the cost of repairs. The plaintiffs claimed that they were entitled to retake possession of the equipment and claimed against the defendants the total rent and all moneys payable under the agreements.

The plaintiffs brought an action against the defendants for their claim and applied for summary judgment under O 14 of the Rules of the High Court 1980. The defendants opposed the application on various grounds. The first ground was that the plaintiffs had delayed in making the application and that no reason had been advanced for the delay. Appearance was entered on 3 October 1985 and the defence was delivered on 18 October 1985. The application for summary judgment was filed on 12 December 1985. The defendants contended that the lease agreements were a subterfuge for sale and purchase agreements. They further contended that the lease agreements were illegal in that they were intended or meant to defeat the revenue laws of the country or alternatively that they were contrary to public policy. The defendants also said that even if the agreements were valid, the defendants would not be liable for the sum claimed but only for the actual damage or loss proved to have been caused by the breach of the agreements or in any other reasonable compensation which was not a penalty. The defendants said that the sums claimed constituted a penalty. They also said that the plaintiffs had failed to mitigate the loss and damage allegedly suffered by them.

Held, dismissing the application:

(1) The plaintiffs were not precluded from taking out an O 14 summons after the defence was filed but the onus of explaining the delay thereafter was on the plaintiffs and in this case the plaintiffs had not discharged the onus as they had not explained the delay.

(2) The defendants had succeeded in raising a triable issue capable of being resolved only by the calling of evidence at a proper trial as to whether the relevant agreements were leasing or hire-purchase agreements. The only place for the proper

airing of the issue was a full trial by evidence including the arguments whether the defendants could in law be allowed to prove that the agreements were other than lease agreements. This would be another legal issue to be thrashed out at the trial.

(3) If the defendants could prove that the agreements had the effect of misleading the Revenue, such agreements would be unenforceable on the ground of public policy. This point had never, in regard to leasing agreements, been taken up before anywhere. On this point alone, the court would have been prepared to let the case go to trial.

(4) The cost of repairs totalling $1,230,000 was nearly half of the plaintiffs' total claim but the plaintiffs failed to give invoices or receipts to show how, when, and where the vehicles concerned were repaired. The plaintiffs had to prove onus of damages. The plaintiffs had claimed to have undertaken repairs to the vehicles but at the material time the vehicles were still in the possession of the defendants. These facts gave rise to another triable issue.

(5) The court was not unmindful of s 92 of the Evidence Act 1950 and it was for the defendants to argue at the trial as to whether it would be open to them to adduce evidence to contradict or vary the written terms of the agreements. This in itself was a question of law to be decided by the trial court and it was not for the instant court to shut the door in their face.

[*Editorial Note*: The plaintiffs' appeals to the Supreme Court vide Civil Appeal Nos 441/86, 442/86 and 443/86 were dismissed on 27 February 1987.]

Cases referred to

1 *Syarikat Bunga Raya Timor Jauh Sdn Bhd & Anor* v *Tractors Malaysia Bhd* [1980] 2 MLJ 127 (refd)
2 *Credit Corporation (Malaysia) Bhd* v *KM Basheer Ahamed & Anor* [1985] 1 MLJ 208 (refd)
3 *Bank Islam Malaysia Bhd* v *Tinta Press Sdn Bhd & Ors* [1986] 1 MLJ 256 (refd)
4 *Societe Des Etains De Bayas Tudjuh* v *Woh Heng Mining Kongsi* [1978] 2 MLJ 267 (refd)
5 *Fender* v *Mildmay* [1938] AC 1 (refd)
6 *WT Ramsay Ltd* v *Inland Revenue Commissioners* [1982] AC 300 (refd)
7 *Inland Revenue Commissioners* v *Duke of Westminster* [1936] AC 1 (refd)
8 *Newton* v *Federal Commissioner of Taxation* [1958]2 All ER 759, PC (refd)
9 *Chong Ngam Sen* v *Yeoh Bah Chee* [1981] 1 MLJ 161 (folld)

Legislation referred to

Contracts Act 1950 s 24
Evidence Act 1950 s 92
Income Tax Act 1967 s 140 & the Third Schedule
Rules of the High Court 1980 O 14
Income Tax Act [Aus] s 260

Maureen Lind (*Miss*) for the plaintiffs.
S Sivasubramaniam (*Sugumar Balakrishnan* with him) for the defendants.

Cur Adv Vult

Abu Mansor J: By their O 14 High Court Rules summons-in-chambers dated 9 January 1986 which was adjourned for argument to open court the applicants/plaintiffs applied for final judgment against the first and second respondents/defendants for the amount claimed in the statement of claim with agreed interest at the rate of 16% pa from 1 July 1985 to date of judgment with the usual statutory interest till final settlement.

The facts of this case are as follows. The plaintiffs carry on a business amongst other things as a dealer in heavy equipment and machinery. The first defendant is a limited company and the second defendant is its director. By an agreement in writing dated 7 May 1981, the first defendant rented from the plaintiffs nine units of equipment (hereinafter called 'the units') for a total rental of $3,739,770 (hereinafter called 'the total rent') subject to the terms and conditions contained therein. The plaintiffs alleged that the first defendant also agreed, inter alia, to pay interest at 16% pa on overdue payments, costs and expenses of retaking the said units, the total rent by instalments in respect of each of the said units. The second defendant had on 7 May 1981 undertaken to guarantee the punctual payments by the first defendant under the agreement. The first defendant paid part of the rentals amounting to $1,286,022 but in breach of the agreement failed to make any further payment. As a consequence of the breach or failure of the first defendant to remedy the breach the first defendant thereby repudiated the agreement accepted by the plaintiffs.

The plaintiffs also alleged that in breach of the terms of the said agreement the first defendant failed to keep the said units in good order and repair, as a consequence the first defendant is liable for the repair costs to keep the same in first class condition as agreed by the first defendant. They alleged that upon the said repudiation the plaintiffs were entitled to retake possession of the said units and claim against the defendant the total rent and all money payable under the agreements. The period of the lease having expired, they have demanded the first defendant to pay the claim of $3,413,323 but he had failed to do so. In breach of the guarantee agreement the second defendant had similarly failed to pay. Hence this court action.

The plaintiffs' application is supported by affidavits (9A) and their supplementary affidavit (P12) wherein are the relevant agreements AYSL1-4 and other documents up to AYSL7. The agreements set out the period of the lease, the description of the units, amount of instalment payable and the obligations of the lessees.

The plaintiffs alleged that the units were used for the following period:

(1) Two units serial no 183412K and no 183410K in AYSL1 attached to encl 12 were used by the first defendant right up to expiry of period 23 December 1983.
(2) Units serial no 908353 and serial no 183874 – the lease expired on 23 December 1983.

(3) Units serial nos 183872, 183873 and 183887 – expiry date was 26 March 1984.
(4) The last two units serial nos 183411 and 183881 – expiry date was 1 September 1985.

The first defendant paid a total sum of $1,286,022 as in encl 5, para 4. Thereafter they defaulted in payment for all units. The plaintiff commenced to repossess and started this action on 23 August 1985. The plaintiffs' application is for arrears of rentals, cost of repairs and repossession charges together with interest and costs.

The plaintiffs' counsel submitted that under the leasing agreement the parties' rights are governed by simple contract law since, as she says, there is no statutory regulation governing leasing. She submitted further there is no real issue of fact or law to go to trial.

The plaintiffs' counsel further submitted that the defendants did not dispute the four agreements and submitted that by the first defendant's payment of the rentals to the plaintiffs of $1,286,022 it was cogent evidence that the defendants are legally obliged to perform under the agreement. They say further that using the said units after the expiry of the agreements is also evidence that they are legally bound to pay.

Plaintiffs' counsel submitted that full particulars of the claim are set out in para 12 of their amended statement of claim, encl 13. The said para 12 gives the total rentals due after deductions of amounts paid and sets out the cost of repairs, repossession charges and overdue interest.

The learned counsel for the plaintiffs urged the court to apply the case of *Syarikat Bunga Raya Timor Fauh Sdn Bhd & Anor* v *Tractors Malaysia Bhd.*[1] She further urged the court that although this case was set aside on appeal by the Privy Council it can be distinguished from our present case in that in our case there is no option to purchase. It is purely a leasing agreement.

The learned counsel for the plaintiffs said that as far as the expired period of the lease is concerned, the defendants are legally bound to pay and even so in respect of the unexpired period of the lease given as item 6 and item 8 at p 7 encl 13. She urged the court to apply the case of *Credit Corporation (Malaysia) Bhd* v *KM Basheer Ahamed & Anor*[2] and she sought to distinguish, in the present case, that the units were not defective and did not break down immediately after delivery when the appellants in that case have themselves committed a breach of the terms by failing to dispose of the machine by a bona fide sale. In this present case the court would only have to decide in respect of the unexpired period of 11 days for the two units the defendants used them up to the expiry of the period.

The plaintiffs' counsel says there is no merit in the defence, encl 5, because the agreements are not a subterfuge for a sale or hire-purchase agreement. They are leasing agreements as stated in AYSL1 as they employ the terms lessors and lessees. For the definition of a lease she relied on the case of *Bank Islam Malaysia Bhd* v *Tinta Press Sdn Bhd & Ors.*[3] As for it being a hire-purchase there is no option to purchase stated in the agreements. She denied that the agreements are intended or are meant to defeat revenue laws and she denied they are against public policy.

As to the other defence raised in respect of quantum the amount is in respect of arrears of rentals; they have accrued in respect of other items of interest and costs of repairs and repossession charges the defendants are bound to pay under the terms and conditions of leasing. They are not a penalty according to the plaintiffs. As far as the allegation that the plaintiffs had failed to mitigate the plaintiffs said they attempted to dispose of the units but this could not be finalized. In any case since the claim is based on arrears of rentals the allegation of failure to mitigate is irrelevant.

Finally the plaintiffs say there are no issues of fact or law to go to trial and urge the court to find that the defendants' defence was not bona fide and prayed for O 14 final judgment.

The defendants opposed the plaintiffs' claim for summary judgment. The defendants firstly opposed this application on the ground of the plaintiffs' delay in making this application and no reason has been advanced by the plaintiffs for that delay. The said plaintiffs filed their writ on 23 August 1985, appearance was entered on 3 October 1985 and defence delivered the defence on 18 October 1985 and the plaintiffs took O 14 proceedings by filing it on 12 December 1985 (the date chop of the court appearing on the plaintiffs' letter dated 5 December 1985) that would be 3½ months of filing of writ, two months after appearance and over two months after defence delivered. The defence alleged nowhere was this explained in affidavit (9A). They say this is fatal and cited the case of *Societe Des Etains De Bayas Tudjuh* v *Woh Heng Mining Kongsi.*[4] I agree with counsel for the defendants that the plaintiffs are not precluded from taking out an O 14 summons after defence is filed but the onus of explaining delay thereafter is on the plaintiffs and in this case the plaintiffs had not discharged the onus as they had explained. In the other cases where the applications were allowed, in spite of delay, the delay was found to be reasonable or excusable delay.

In the defendants' defence they admit signing the agreements but they aver that the purported lease agreements were a subterfuge for sale and purchase agreements and or hire-purchase agreements. They further

alleged that the lease agreements are illegal in that they were intended or meant to defeat the revenue laws of the country or alternatively that they are contrary to public policy. The defendants alleged that even if the agreements are valid (though denied) they would not be liable for the sums claimed but only for the actual damage or loss proved to have been caused by the breach of the lease agreement or in any otherwise reasonable compensation which is not a penalty. They contended that the sums in cl 8 of the lease agreement constituted such penalty. They also alleged that the plaintiffs failed to mitigate.

In support of their defence the second defendant filed an affidavit sworn on 28 June 1986. In the said affidavit the defendants alleged that the said nine units were purchased by the defendants. Defendants' counsel submitted that the lease agreements must be looked at as a whole from all the surrounding circumstances in order to come to the true nature of the transaction.

The defendants do not deny that the financing of their purchase was from the plaintiffs. After they were purchased the defendants averred they entered into a leasing agreement. They tendered in evidence exh A1-A7 showing delivery notes to the nine units which were dated in various months in 1981 and then they said letter B1 dated 26 March 1984 attached to the affidavit, encl 14, a letter from the plaintiffs to the defendants, said that although they are no longer distributors of Kenworth vehicles in Sabah and Sarawak 'we are still prepared and in a position to provide you with warranty and other services for vehicles sold by us' lending support to their contention that the nine units were in fact sold to them. The defendants say the use of the words 'warranty' and 'sold by us' prove that they were sold. They deny the plaintiffs' counsel's statement at the Bar that it was a general circular but a letter specifically sent to the defendants. Defence counsel complained that B1 was made an exhibit in June 1986 and, other than the plaintiffs' counsel saying at the Bar table that it is a general circular, it had to be accepted for what it says in the absence of any explanation from the plaintiffs. After looking at the defendants' defence, the second defendant's affidavit and B1, I am of the view that the defendants had succeeded in raising a triable issue capable of being resolved by the calling of evidence only at a proper trial as to whether the relevant agreements were leasing or hire-purchase agreements. The only place for the proper airing of the issue is a full trial by evidence including the arguments whether the defendants could in law be allowed to prove that the agreements are other than a lease agreement. This would be another legal issue to be thrashed out at the trial.

In answer to the plaintiffs' contention that the transaction could not be sale by hire-purchase as there was absence of option, the learned counsel for the defendants said that there would not be the use of the word 'option' because it is a subterfuge. He urged the court to look at exh AYSL7 attached to the affidavit, encl 12, which is a letter from the defendants to Forest Marketing Agency confirming some arrangements regarding marketing of the defendants' logs but also requesting that agency, after settling of forest royalty, to pay the balance to the plaintiffs 'to liquidate our outstanding' and it also uses the words 'to pay the monthly lease instalments' instead of rentals current with the plaintiffs as opposed to rentals and there is a reference that the plaintiffs are aware of the arrangement. The defence counsel submitted what terms used are neither here nor there but for the court to look at the transaction as a whole to discover its true nature that the lease rentals were in effect instalments for the purchase of the said units.

The defendants' counsel then refers to s 24 of the Contracts Act 1950. The purpose or object of an agreement is lawful unless it comes under s 24(a)-(e), it then is against public policy and it should not be enforced. In our present case counsel for the defendants said it may be unlawful as it may come under s 24(b) and (e). I quote s 24 of the Contracts Act where it is relevant:

> 24 The consideration or object of an agreement is lawful, unless:
>
> (a) ...
> (b) it is of such a nature that, if permitted, it would defeat any law;
> (c) ...
> (d) ...
> (e) the court regards it as immoral, or opposed to public policy.

In each of the above (b) and (e) the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void. Learned counsel for the defendants contended that while the authority in *Fender* v *Mildmay*[5] says that the courts are reluctant to extend the realm of public policy cases it is equally true to say that the modern tendency of the revenue law is to prevent a citizen from evading or avoiding tax. He submitted that most jurisdictions are against tax evasion practice but not tax avoidance. The jurisdiction of Australia, however, after the decision in *WT Ramsay Ltd* v *Inland Revenue Commissioners*[6] made tax avoidance illegal. This was following, he says, the doctrine as laid down in *Inland Revenue Commissioners* v *Duke of Westminster*.[7]

As far as tax avoidance is concerned our revenue law is s 140 of the Income Tax Act 1967 which follows the Australian provision. It is in pari materia with s 260 of the Australian Income Tax Act. Perhaps I should set out s 140 of the Malaysian Income Tax Act relevant to avoidance:

> 140(1) The Director-General where he has reason to believe that any transaction has the direct or indirect effect of

(a) ...
(b) ...
(c) evading or avoiding any duty or liability which is imposed or would otherwise have been imposed on any person by this Act; or

may ... disregard or vary the transaction and make such adjustments as he thinks fit with a view to counteracting the whole or any part of any such direct or indirect effect of the transaction.

As it will be seen s 260 of the Australian Income Tax Act uses the same words 'defeating ... or avoiding any liability imposed ... by the Act' (see *Cases and Material on Taxation* (1978), p 90 of encl 17). At p 649 of the same *Cases and Material on Taxation* (1978) – Baxt & Ors, p 90 of encl 17 – the learned author discussing the case of *Newton* v *Federal Commissioner of Taxation*[8] says:

Section 260 is a very widely phrased legislative directive to the courts to strike down transactions which avoid any liability imposed by the Act.

And further on at p 653 thereof the learned author further says:

In applying the section you must by the very words of it look at the arrangement itself and see which is its effect ... by the overt acts by which it was implemented – that it was implemented in that particular way so as to avoid tax.

and arrangement covers agreements, contracts and less binding arrangements having that effect.

In the present application the court accepted defence counsel's submission that if it can be proved that it is not what it is but a subterfuge for tax avoidance, and, that can only be by evidence at a proper trial, the tax advantage or avoidance is clear. If the pieces of equipment are on lease then the lessee is not the owner. He can then claim allowance under Schedule X of the Third Schedule to the Income Tax Act 1967 as initial allowance. If you are owner then your tax position would be according to paras 15 and 18 of the said Schedule. Whatever is paid as rentals are written off for tax purposes. If equipment had been bought on hire-purchase then there is depreciation for tax but never really written off. Counsel also drew my attention to the several cases at pp 24, 29, 30 and 40, encl 17, where the agreements had the effect of misleading the Revenue and they were declared void on the ground of public policy and if the defendants are successful by evidence in contending that in the present case there is such contract it would then be unenforceable.

It was contended by counsel for the plaintiffs the court should find for them because, she said, this was the first time this line of argument had been taken. In all the cases on leasing cited by her in none had it been said it is unenforceable on grounds of public policy. With respect to learned counsel what had been contended by learned defendants' counsel is a shade different from that. He said that if they can prove by evidence that it is a subterfuge to avoid tax then it is caught by s 24 of the Contracts Act on grounds of public policy. Each case must be looked at on its own facts and it is not for the court to generalize and for the court to stifle it, just because it had never been brought up before, is to kill it prematurely which will definitely not contribute to the development of this living law. I accept defendants' counsel's submission that this point had never, in leasing, been anywhere taken up before. On this point alone the court would have been prepared to let it go to trial but there were others.

In coming to the quantum of damages learned defence counsel addressed the court on the cost of repairs for all vehicles totalling $1,230,000 which is nearly half of the plaintiffs' total claim. For such a large amount, the plaintiffs failed to give invoices or receipts how, when and where the vehicles were repaired. In particular, in respect of vehicle nos 1, 4, 5, 6 and 7 the repair costs as alleged far exceeded the rentals due. If, however, the lease agreements are scrutinized the following would appear, as in encl 12, to be the residual value of the vehicles:

(a) AYSL1 the residual value of 2 vehicles ... $71,000;
(b) AYSL2 ... $71,000;
(c) AYSL3 ... $106,500;

With a total of seven vehicles to be $248,500 and if the last two are also taken account of it could come to $319,500 or thereabouts. Counsel contended that if these are the values of the vehicle then it would not be worthwhile to have them repaired for $1.3 million. All in all the effect of his submission on this point is that the plaintiffs had to prove the important onus of damages. In fact counsel for the defendants managed to point out apparent irregularities in respect of vehicles under item 6 and item 7 in the statement of claim, encl 13. The writ in the present case was taken out on 23 August 1985 stating that the plaintiffs had possession of vehicle serial no 183873 and 183411. According to para 11 of the amended statement of claim repossession was done on 1 September 1985 and 22 September 1985. Counsel for the defendants quite correctly questioned how repairs were alleged to have been effected and claims made thereon when at the time of writ these vehicles were supposed to be still in their clients' possession. This was yet another triable issue.

After hearing the parties and considering all the points raised especially the combined effect of B1, encl 14 and AYSL 7 of encl 12, I was of the view that the defendants had succeeded in raising triable issues of fact and law as follows:

(a) whether the leasing agreements entered into between the parties are illegal arrangements which had an effect of tax avoidance and therefore void;

(b) if (a) is in the affirmative, what effect would the trial court's decision have on the present claim;
(c) in the event that the trial court holds that the agreements are valid would the plaintiffs have to prove all the damages they claim. If so, how much? These triable issues can only be properly ventilated in a proper trial by calling evidence and proper submissions made on the law.

In so holding that there are triable issues I am not unmindful of s 92 of the Evidence Act 1950 wherein it will be for the defendants to argue at the trial whether it will be open for them to contradict or vary the written terms. This in itself is a question of law to be decided by the trial court and to my mind it is not for this court to shut the door in their face. Depending on the evidence to be adduced on the combined effect of B1 and AYSL7 it is not open to this court to say they, ex facie, are frivolous and if capable of proof they would certainly bring it under proviso (a) at least of s 92 of the Evidence Act. That being the case, following *Chang Ngam Sen* v *Yeoh Bah Chee*,[9] as there are questions of law and fact to be determined I dismissed the plaintiffs' application with costs.

As agreed by all parties the decision in this Suit No K924/85 will be binding on the plaintiffs in the other two Suit Nos K932/85 and K934/85 in which the issues are similar in nature.

Order accordingly.

Solicitors: *William Liaw Chan Lind & Co*; *Pandikar Juhar & Sugumar*.

Reported by *PS Ranjan*

Supreme Leasing Sdn Bhd v Lee Gee & Ors

HIGH COURT (KUALA LUMPUR) – SUIT NO C5983 OF 1985
VC GEORGE J
12 OCTOBER 1987

Hire Purchase – Serial number and engine number of tractor not indicated in hire-purchase agreement – Whether there exists certainty of subject matter – Tractor could not be located for repossession to be effected – Whether claim on basis that tractor is lost contravenes s 75 of Contracts Act 1950 – Whether there must be actual demand for return of tractor before claim in detinue and conversion can be tenable – Terms of agreement to be looked at – Contracts Act 1950, ss 30 & 75

The first and second defendants entered into a hire-purchase agreement with the plaintiff in respect of a tractor. In the agreement, the tractor was described as a Caterpillar 966C, year of manufacture 1980. The chassis number and the engine number of the tractor were not set down in the agreement. The defendants fell into arrears and the plaintiff gave notice that they would terminate the agreement. The plaintiff had also sent a notice of intention to repossess to the defendants. However, the plaintiff was unable to repossess the tractor as the whereabouts of the tractor were unknown. Subsequently, the plaintiff succeeded in obtaining an O 14 judgment against the defendants. The defendants appealed against that judgment, contending that: (a) there was no certainty of subject matter in the agreement as the serial number and engine number of the tractor were not set down in the agreement. Illustration (a) to s 30 of the Contracts Act 1950 was relied on for this contention; (b) there should be a demand for the goods for a claim in detinue and conversion to be tenable; (c) the plaintiffs, in not repossessing the goods, had not mitigated the damages and thus s 75 of the Contracts Act was contravened.

Held, dismissing the appeal:

(1) In the instant case, the subject matter of the agreement is a tractor of a particular make of a particular cubic capacity manufactured in a particular year and which was duly delivered. Illustration (a) to s 30 of the Contracts Act 1950 has no application on those facts.

(2) The rule that there must be a demand for the return of the goods for a claim in detinue and conversion to be tenable has to be qualified by adding the words 'unless the parties have otherwise agreed'. In the instant case, cl 14 of the hire-purchase agreement provides that the hirer shall return the goods to the owner in the event of the hiring being determined by the hirer or the owner under cll 11-12. On the facts, it is clear that the owner had determined the hiring and therefore the mandatory requirements of cl 14 were obtained. Failure by the first and second defendants to return the goods amounts to detinue and conversion without the prerequisite that there be a demand for the goods.

(3) Section 75 of the Contracts Act 1950 deals with penalty clauses in a contract. Clauses 4 and 8 provide for the hirer to be responsible for the goods and to indemnify the owner for the loss or destruction of the goods. Accordingly, the computation of the claim on the basis that the machine is lost (as the goods could not be repossessed) does not contravene s 75 of the Contracts Act.

Legislation referred to
Contracts Act 1950 ss 30, illustration (a) to s 30, 75

Sharon Yap (Ms) for the defendants/appellants.
Chai Woon Fook for the plaintiff/respondent.

Cur Adv Vult

VC George J: On 19 February 1983, the first and second defendants entered into a written hire-purchase agreement with the plaintiff in respect of 'one (1) unit Caterpillar 966C' which I take to be a tractor. Tractors are not included in the Schedule to the Hire-Purchase Act and it was submitted on behalf of the plaintiff without demur that accordingly the agreement is outside the Act. The other defendants are guarantors of the first and second defendants in respect of their obligations under the agreement.